

# Chapter 6: MEPA: Is It Substantive, Procedural, or Both?

## CHAPTER SUMMARY

- < Five pieces of legislation (SB 302 in 1977, SB 388 in 1977, SB 506 in 1979, SB 368 in 1983, and SJR 20 in 1983) were introduced that would have clarified that MEPA is strictly a procedural statute or an action-forcing substantive statute or that would have studied the impacts of the substantive vs. procedural issue. All five bills contentiously failed.
- < Three MEPA court cases analyzed and ruled on the issue of whether MEPA supplements an agency's permitting/licensing authority or is strictly procedural. Two cases favor a substantive interpretation, and the other case favors a procedural interpretation. However, in seven court cases in which a judge or the Supreme Court has judicially reviewed other MEPA issues, the courts have made statements that NEPA and MEPA are essentially procedural statutes.
- < The state courts are split on the issue. Add to that the 1999 Supreme Court ruling in the *Montana Environmental Information Center v. Dept. of Environmental Quality* case that defines Montanan's right to a clean and healthful environment, which may or may not have a bearing on whether MEPA is substantive or not, and the courts of Montana have not added much clarity to this issue.
- < As with the Legislature and the courts, the agencies are also not consistent on the issue of implementing MEPA substantively or procedurally. Each of the agencies has its own interpretation. DEQ and FWP each implement MEPA both substantively and procedurally depending on the permitting or licensing act being implemented and on particular factual circumstances. DNRC and MDT strictly implement MEPA procedurally.
- < At the federal level, the United States Supreme Court has determined repeatedly that NEPA is essentially a procedural statute.
- < Of the 15 states, the District of Columbia and the Commonwealth of Puerto Rico, only 5 jurisdictions (California, Minnesota, New York, Washington, and the District of Columbia) implement their SEPA's substantively.
- < The importance of this issue is obvious--should MEPA dictate a result or dictate a process or both? Currently it is "both". A consensus of the

Montana public, the Legislature, state agencies, and state courts on this divisive issue, has not been reached to date--or maybe it has.

# Chapter 6: MEPA: Is It Substantive, Procedural, or Both?

## What Is the Substantive vs. Procedural Issue and Why Is It Important?

### *Definitions*

Everyone throws out the terms "substantive" and "procedural" when talking about the Montana Environmental Policy Act. But what do those terms really mean? The following are the definitions of "substantive" and "procedural":

**Substantive:** If an agency implements MEPA substantively it could mean the following:

- (1) that MEPA dictated the agency's decision in some way (action-forcing); and/or
- (2) that the agency is using MEPA as the authority to mitigate or use stipulations on a permit, license, or state-initiated action beyond the agency's permitting, licensing, or state-initiated action authority.

**Procedural:** If an agency implements MEPA procedurally, it means that MEPA does not dictate a certain result--it is an information process only. As long as the decisionmaker has been fully informed, the decisionmaker can make a decision regardless of the impacts disclosed in the MEPA document.

### *Why Is the Substantive vs. Procedural Issue Important?*

At its very core, this issue resolves around whether MEPA provides state agencies with additional authority to regulate a permit or license or whether MEPA directs a state agency that is taking a state-initiated action (i.e., timber sale or building a fishing access site) to conduct that action in a certain way.

The substantive vs. procedural issue has been a politically divisive one in the past. In the late 1970s and early 1980s, the Legislature debated the issue extensively and contentiously and could never come to any resolution. Since the early 1980s, debate on this issue has been almost nonexistent. This could be attributed to a variety of factors. State agencies primarily use MEPA procedurally, which has not engendered controversy. The instances in which the agencies have used MEPA substantively have been very narrow and limited.

The state courts have differing opinions on the issue. Add to that the 1999 Supreme Court ruling in the *Montana Environmental Information Center v. Dept. of Environmental Quality* case that defines Montanan's right to a clean and healthful environment, which may or may not have a bearing on whether MEPA is substantive or not, and the courts of Montana have not added much clarity to this issue.

Some state agencies implement MEPA both procedurally and substantively, while other agencies implement MEPA procedurally. Public testimony before the Subcommittee has been split on this issue.

The importance of this issue is obvious--should MEPA dictate a result or dictate a process or both? Currently it is "both". A consensus of the Montana public, the Legislature, state agencies, and state courts on this divisive issue, has not been reached to date--or maybe it has.

## Legislative History

Five pieces of legislation (SB 302 in 1977, SB 388 in 1977, SB 506 in 1979, SB 368 in 1983, and SJR 20 in 1983) were introduced that would have clarified that MEPA is strictly a procedural statute or an action-forcing substantive statute or that would have studied the impacts of the substantive vs. procedural issue. All five bills contentiously failed.

Historically, nothing highlights the substantive vs. procedural issue more than the events that unfolded during the 1977 Legislative Session. Frustrated by divergent opinions regarding the status of MEPA and ready for a resolution, Governor Tom Judge offered two opposing legislative proposals, requesting that the Environmental Quality Council (EQC) and the Administrative Code Committee jointly introduce the bills. One bill clarified that MEPA was procedural, while the other bill clarified that MEPA was substantive. The Administrative Code Committee introduced the procedural bill (SB 302) with modifications. The EQC introduced SB 388, a substantive, action-forcing piece of legislation with modifications. The following language in each bill highlights the opposing views:

**SB 302**      Pertinent portion of the title of the bill: AN ACT TO AMEND THE MONTANA ENVIRONMENTAL POLICY ACT TO SPECIFY THAT THE ACT DOES NOT EXPAND THE SUBSTANTIVE DECISION-MAKING AUTHORITY OF STATE AGENCIES . . .

Amendatory language making MEPA procedural: "make a final decision on an action for which an environmental impact statement has been prepared, based only on the express decision-making authority granted to the agency under the specific statute administered by the agency."

**SB 388**      Pertinent portion of the title of the bill: AN ACT TO AMEND THE MONTANA ENVIRONMENTAL POLICY ACT, CLARIFYING STATE AGENCY DUTIES IN ENVIRONMENTAL DECISIONMAKING . . .

Amendatory language making MEPA substantive: “No board, commission, or agency of the state may implement any policy, adopt any rule, or approve any action inconsistent with the policies and goals expressed in this chapter [MEPA] unless the board, commission, or agency can demonstrate that:

(a) there is no feasible alternatives consistent with the public health, safety, or welfare;

(b) the benefits of the policy, rule, or action, as defined by some other essential consideration of state policy, outweigh the harm to the environment; and

(c) the formulation of the proposed policy or the planning and implementation of the proposed action includes all feasible efforts to comply with the policies, goals, and procedures of this chapter and to mitigate adverse environmental impacts to the fullest extent possible.”

The 1977 Legislature was unable to choose a policy direction--both bills failed. SB 302 was reintroduced in 1979 as SB 506, but the results were the same. In 1983, SB 368 was introduced that again attempted to clarify that MEPA is procedural. The language in this bill stated:

. . . nothing in this chapter [MEPA] creates any right of action beyond one to require an environmental impact statement or expands the decision making authority granted by the existing authorizations [state permitting/licensing authority . . .

When SB 368 failed, an attempt was made to study the procedural vs. substantive issue, but SJR 20 also failed to pass the 1983 Legislature. Not a single bill has been introduced on the procedural vs. substantive issue since the 1983 Legislative Session.

## Judicial Perspectives

Three MEPA court cases analyzed and ruled on the issue of whether MEPA supplements an agency’s permitting/licensing authority or is strictly procedural.

The first court to rule on this issue was the Montana Supreme Court in *Montana Wilderness Association v. Board of Health and Environmental Sciences* (1976). In that case, the Supreme Court held that there was a direct conflict between MEPA and the Montana Subdivision and Platting Act (MSPA). The MSPA specifically limits the state's review of local development to water supply, sewage disposal, and solid waste disposal. The MPA further places control of subdivision development in local governmental units in accordance with a comprehensive set of social, economic, and environmental criteria and in compliance with detailed procedural criteria. MEPA does not extend or supplement the state's control over subdivisions beyond matters of water supply, sewage disposal, and solid waste disposal.

In 1982, Judge Bennett of the First Judicial District determined that MEPA is substantive under the Metal Mine Reclamation Act (*Cabinet Resource Group v. Dept. of State Lands*).

In making his ruling, Judge Bennett specifically noted the following:

- X That "MEPA itself specifies that its policies and goals are supplementary to the existing authorizations of state boards, commissions and agencies. 75-1-105, MCA".
- X That there is not a direct conflict between the Metal Mine Reclamation Act (MMRA) and MEPA in this case. Denial of a permit under the MMRA is discretionary and there is no clear statutory language barring consideration of environmental factors. And therefore the Supreme Court holdings in *Montana Wilderness Association v. Board of Health and Environmental Sciences* (1976) and *Kadillak v. The Anaconda Company* (1979) do not apply in this case.
- X That court cases under the National Environmental Policy Act (NEPA) have held that NEPA is more than an environmental disclosure law--it was intended to effect substantive changes in decisionmaking.
- X That "it is not sufficient for the agency to note the presence of adverse environmental factors while denying authority to do anything about them".
- X That Montana's constitutional right to a clean and healthful environment provides the necessary authority to supplement an agency's decisionmaking authority.

The Department of State Lands and its successor, the Department of Environmental Quality, have implemented MEPA substantively for MMRA and the Strip and Underground Mine Reclamation Act since 1982.

The last case in which a ruling was made specifically on this issue was *Kilpatrick v. Dept. of Fish, Wildlife, and Parks* (1993). Kilpatrick sued FWP, on the basis that FWP was not authorized under MEPA, the game farm (now alternative livestock ranch) statutes, or the zoo/menagerie statutes to attach conditions to permits or licences that it issues. At issue was whether FWP could attach and enforce conditions under MEPA to permits/licences it issues in order to mitigate adverse impacts on the environment. Judge Sherlock held that although there is nothing in the game farm (now alternative livestock ranch) or zoo/menagerie statutes specifically authorizing FWP to attach conditions to permits, the issuance of a permit is an action governed by MEPA and that FWP was required to perform an EA before issuing a permit. ARM 17.4.607 states that EAs are intended to help an agency develop conditions, stipulations, or modifications to be made part of a proposed action. FWP was "well within the bounds of its authority to impose the eleven stipulations listed in the EA and attached to Plaintiff's [Kilpatrick's] permits". Judge Sherlock concluded that the stipulations attached to Kilpatrick's permit are valid and enforceable as reasonable measures to mitigate potentially adverse effects on the environment.

The state courts, in judicially reviewing MEPA generally, have made statements that the National Environmental Policy Act and MEPA are essentially procedural statutes. Set out below are seven court cases and highlighted court discussion on this issue.

The Supreme Court, in *Ravalli County Fish and Game Association v. Dept. of State Lands* (1995), citing federal precedent, noted that:

NEPA requires that an agency take a "hard look" at the environmental impacts of a given project or proposal. See *Kleppe v. Sierra Club* (1976), 427 U.S. 390, 410, n.21, 96 S.Ct. 2718, 2730, 49 L.Ed.2d 576, 590. NEPA is essentially procedural; it does not demand that an agency make particular substantive decisions. *Stryker's Bay Neighborhood Council v. Karlen* (1980), 444 U.S. 223, 227-28, 100 S.Ct. 497, 499-500, 62 L.Ed.2d 433, 437. MEPA requires that an agency take procedural steps to review "projects, programs, legislation, and other major actions of state government significantly affecting the quality of the human environment" in order to make informed decisions. Section 75-1-201(1)(b)(iii), MCA; See Sec. 26.2.643, ARM.

The Montana Supreme Court, in *Montana Wilderness Association v. Board of Natural Resources and Conservation* (1982), also referred to federal precedent:

*Trout Unlimited v. Morton* (CCA 9, 1974), 509 F.2d 1276: We [the federal court] held that the §706(2)(D) standard was the proper one because NEPA is essentially a procedural statute. Its purpose is to assure that, by following the procedures that it prescribes, agencies will be fully aware of the impact of their decisions when they make them. The procedures required by NEPA, 42 U.S.C.A. section 4332(2)(C), are designed to secure the accomplishment of the vital purpose of NEPA. That result can be achieved only if the prescribed procedures are faithfully followed; grudging pro forma compliance will not do.

Judge Sherlock, in *Skyline Sportsmen's Association v. Board of Land Commissioners* (1999), noted:

This Court notes that the whole purpose of the Montana Environmental Protection Act is procedural. It is not to dictate a certain result. Thus, if the decision makers (here the Commissioners) have been fully informed, they are allowed to make a decision with which others may not agree. Here, one of Plaintiff's main concerns was the reduction in hunter opportunity. This matter was fully disclosed to the decision makers in the FEIS.

To determine if the agency followed the law, the Court notes that the MEPA is essentially procedural. It does not demand that an agency make a particular substantive decision. MEPA requires that an agency take

procedural steps to review actions of state government in order to make informed decision. *Ravalli Co. Fish and Game Assoc. v. Department of State Lands*, 273 Mont. 371, 377-78, 903 P.2d 1362, 1367 (1995).

Judge Honzel, in *Friends of the Wild Swan v. Dept. of Natural Resources and Conservation* (1998), noted that:

The Montana Supreme Court has held that MEPA is procedural, not substantive. See *Ravalli Co. Fish and Game Ass'n, Inc. v. Dep't of State Lands*, 273 Mont. 371, 377, 903 P.2d 1362, 1367 (1995) (citing *Stryker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 100 S. Ct. 497, 62 L. Ed. 2d 433 (1980)). The Court is required to give great deference to agency expertise in matters of substantive policy decisions. See *North Fork Preservation Ass'n v. Dep't of State Lands*, 238 Mont. 451, 778 P.2d 862 (1989).

In Count III, FWS alleges that DNRC failed to prepare a cumulative watershed analysis for the Middle Soup timber sale. However, no evidence was presented at the hearing regarding FWS's procedural challenge to DNRC's watershed analysis. As noted, MEPA is essentially procedural. "[I]t does not demand that an agency make particular substantive decisions." *Ravalli Co. Fish and Game Ass'n, Inc. v. Dep't of State Lands*, 273 Mont. 371, 377, 903 P.2d 1362, 1367 (1995). Since particular methods of forest management and watershed analyses are not prescribed by law, DNRC has the discretion to choose reasonable methods.

Judge Honzel, in *National Wildlife Federation v. Dept. of State Lands* (1994), states that:

The Montana Environmental Policy Act (MEPA) is a procedural act designed to ensure that decision makers and the public are fully apprised of the environmental consequences of government actions before public resources are committed to those actions. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989) (agencies must take a "hard look" at the environmental consequences of their actions).

Judge Honzel, in *Mott v. Dept. of State Lands* (1994), notes again that:

MEPA is a procedural statute designed to ensure that decision makers and the public are fully apprised of the environmental consequences of government actions before public resources are committed to those actions. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989). (Agencies must take a "hard look" at the environmental consequences of their actions.)

In *Westview People's Action Association v. Dept. of State Lands* (1990), Judge Harkin, citing federal precedent, noted:



In *Stryker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 62 L.Ed. 2d 433, 100 S.Ct. 497 (1980) the U.S. Supreme Court held that all the NEPA requires is some consideration of environmental consequences. It does not direct the discretion of any agency concerning the choice of action to be taken, or the weight to be given any environmental factors. Fundamental policy decisions of an administrative agency are not reviewable under MEPA.

There is no question that the state courts are split on the substantive vs. procedural issue. The 1999 Supreme Court ruling in the *Montana Environmental Information Center v. Dept. of Environmental Quality* case defines each Montanan's right to a clean and healthful environment. This defined right under the Constitution may or may not have a bearing on whether MEPA should be implemented substantively or procedurally. Only a court decision on this specific issue will shed some light on the Constitution's role in this matter.

## Agency Perspectives

The MEPA Subcommittee requested a state agency attorney panel discussion on whether the agencies were implementing MEPA substantively, procedurally, or both. Although the Department of Transportation's attorney was not present, EQC staff asked MDT's opinion on the matter. **Table 6-1** sets out the agencies' responses.

As with the Legislature and the courts, the agencies are also inconsistent on the issue of implementing MEPA substantively or procedurally. Each of the agencies has its own interpretation. DEQ and FWP each implement MEPA both substantively and procedurally depending on the permitting or licensing act being implemented and the particular factual circumstances. DNRC and MDT strictly implement MEPA procedurally.

Since 1982, the former Department of State Lands, now DEQ, has implemented MEPA substantively under the metal mine reclamation laws in only two instances. One instance involved the Diamond Hill Mine. An EIS determined that there were some potential traffic problems based on the fact that the road was narrow and haul trucks would be entering the highway. The department imposed conditions as to placement of roadside flag people at certain places on the county road and the actual hours when the trucks could haul materials. This was clearly outside the agency's permitting authority. Another instance was the Stillwater Mine. Traffic stipulations required that for a period of years the mine would need to bus employees to the mine site from Absarokee. This was designed to mitigate traffic safety and wildlife impacts.

**Table 6-1. Is MEPA Substantive or Procedural? Agency Responses**

<b>State Agency</b>	<b>Does your agency implement MEPA substantively?</b>	<b>Does your agency implement MEPA procedurally?</b>	<b>Should this issue be clarified one way or the other?</b>
Department of Environmental Quality	Yes. For metal mine reclamation and the Strip and Underground Mine Reclamation Act	Yes. For water quality, air quality, hazardous waste, solid waste, public water supply, major facility siting, and underground storage tank	From a legal standpoint, if the issue were clarified it would avoid the potential for litigation.
Department of Natural Resources and Conservation	No	Yes	Clarification would minimize litigation.
Department of Fish, Wildlife, and Parks	Yes	Yes	It would depend on how MEPA was defined and what was meant by the terms. Someone who is disappointed in the regulatory scheme and did not think the environment was protected may not have the avenue to challenge through MEPA, but would then challenge the agency's action under a failure to abide by the constitutional requirement of a clean and healthful environment.
Department of Transportation	No	Yes	Not a strong feeling one way or the other.

According to FWP legal counsel, the Department has implemented MEPA substantively to condition game farm (alternative livestock ranch) licenses not more than three or four times. In the department's view these conditions did not constitute significant restrictions on the operation of the game farm or alternative livestock ranch. The alternative livestock industry disagrees with the department's view on this matter.

## Federal Interpretation

Since *Kadillak*, if MEPA or the agencies' administrative MEPA rules do not provide adequate direction, Montana state courts will look to federal statutory, regulatory, and case law on the National Environmental Policy Act (NEPA) for guidance. Almost every Montana state court case cites some federal precedent to support its legal conclusions.

Judge Bennett, in *Cabinet Resource Group v. Dept. of State Lands* (1982), found federal precedent to support the conclusion that MEPA can be applied substantively (*Clavert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d 1109 (D.C. Cir. 1971); *Weinber v. Catholic Action of Hawaii*, 102 S.Ct. 197 (1981); *Environmental Defense Fund, Inc. v. Corps of Engineers, U.S. Army*, 470 F.2d 289 (8th Cir. 1972); *Environmental Defense Fund v. Tennessee Valley Authority*, 468 F.2d 1164 (6th Cir. 1972); *Trout Unlimited v. Morton*, 509 F.2d 1276 (9th Cir. 1974); *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693 (2nd Cir. 1972)). Having supported his conclusions with federal precedent, he went on to say that “in the event we could not find support for our conclusion in NEPA interpretation, the combination of MEPA and the above [Montana] constitutional sections would provide the necessary authority”.

However, at the federal level, the United States Supreme Court has determined repeatedly that NEPA is essentially a procedural statute. (See the following cases: *Aberdeen & Rockfish R.R. v. Students Challenging Agency Regulatory Procedures*, 422 U.S. 289 (1975); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978); *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980); *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983); *Robertson v. Methow Valley Citizens Council*, 109 S.Ct. 1835 (1989).) Most of the commentators and law review articles agree, NEPA is viewed as a procedural statute (citations here are too numerous to list).

## Other States' Interpretation

Of the 15 states, the District of Columbia, and the Commonwealth of Puerto Rico, only 5 jurisdictions (California, Minnesota, New York, Washington, and the District of Columbia) implement their SEPAs substantively. In some of the states (Washington and New York), the courts have determined that the SEPAs were action-forcing or substantive statutes. The other jurisdictions (Minnesota, District of Columbia, and California) have statutory action-forcing language.